2009

Richard Norris v. Utah Labor Commission, Harold Van Adams and/or Unisured Employers Fund : Brief of Appellee

Utah Court of Appeals

Case No. 20090784-CA

IN THE UTAH COURT OF APPEALS

RICHARD NORRIS,

Petitioner/Appellant,

v.

UTAH LABOR COMMISSION, HAROLD VAN ADAMS and/or UNINSURED EMPLOYERS FUND,

Respondents/Appellees.

Petition for Review of Final Agency Action of the Utah Labor Commission

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ORAL ARGUMENT NOT REQUESTED BY RESPONDENT/APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

JURISDICTION AND NATURE OF PROCEEDINGS 1

ISSUES PRESENTED UPON APPEAL 2

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES 3

STATEMENT OF THE CASE 4

A. Nature of the Case, Course of Proceedings, and Disposition Below 4

B. Statement of Relevant Facts 5

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S CONCLUSION THAT PETITIONER WAS AN INDEPENDENT CONTRACTOR 8

A. Part or Process in the Trade or Business 9

B. Method of Payment 10

C. Extent of Actual Supervision 14

D. Right to Control the Work v. Autonomy 15

E. Tools and Supplies 19

F. Miscellaneous Factors 20

II. ANY WORKING RELATIONSHIP BETWEEN PETITIONER AND RESPONDENT ADAMS WAS SEVERED BEFORE PETITIONER SUSTAINED HIS INJURY 21

III. LIBERAL CONSTRUCTION OF THE WORKERS' COMPENSATION ACT DOES NOT ENTITLE PETITIONER TO BENEFITS WHERE THE RECORD SUPPORTS THE COMMISSION'S CONCLUSION 26

Page

CONCLUSION 27

STATEMENT REGARDING ORAL ARGUMENT 27

TABLE OF AUTHORITIES

Page

CASES

Allen v. Dep't of Workforce Servs., Workforce Appeals Bd.,
2005 UT App 186, 112 P.3d 1238 3

Bennet v. Indus. Comm'n of Utah,
726 P.2d 427 (Utah 1986) 9

Dipoma v. McPhie,
2001 UT 61, 29 P.3d 1225 20

Gates v. Labor Comm'n,
2002 UT App 428, 2002 WL 31839167 ..... 2, 7, 11, 26

Grace Drilling Co. v. Bd. of Review,
776 P.2d 63 (Utah App. 1989) 7-8, 11, 25

Grand County v. Rogers,
2002 UT 25, 44 P.3d 734 2

Herman v. Sherwood Indus., Inc.,
244 Conn. 502, 710 A.2d 1338 (1998) 24

Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints,
2007 UT 42, 164 P.3d 384 ..... 8, 11

Nails v. Market Tire Co.,
29 Md. App. 154, 347 A.2d 564 (Md. Ct. Spec. App. 1998) 24-25

Nicholson v. Indus. Comm'n,
76 Ariz. 105, 259 P.2d 547 (1953) 22-23

Osman Home Improvement v. Indus. Comm'n,
958 P.2d 240 (Utah App. 1998) 2

Rustler Lodge v. Indus. Comm'n of Utah,
562 P.2d 227 (Utah 1977) 9-10

St. Anthony Hosp. v. James,
889 P.2d 1279 (Okla. App. 1994) 23-24

Page

Salt Lake City Corp. v. Labor Comm'n,
2007 UT 4, 153 P.3d 179 3

Strate v. Labor Comm'n,
2006 UT App 179, 136 P.3d 1273 26

Zupon v. Indus. Comm'n of Utah,
860 P.2d 960 (Utah App. 1993) 22

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. § 34A-2-103 (West 2004) (subsection (7)(a) amended 2008) 8

Utah Code Ann. § 34A-2-103 Supp. 2009) 9

Utah Code Ann. § 34A-2-401 (West 2004) 3

Utah Code Ann. § 63G-4-403 (West 2009) 3

Utah Code Ann. § 78A-4-103 (West 2009) 1

Utah R. App. P. 30 2

PRIOR AND RELATED APPEALS

To the best knowledge of respondent Uninsured Employers Fund, there are no prior or related judicial appeals in this case.

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BRIEF OF APPELLEE UNINSURED EMPLOYERS FUND

JURISDICTION AND NATURE OF PROCEEDINGS

The petition for review of this workers' compensation claim is taken from the Labor Commission's Order Amending ALJ's Decision and Affirming Denial of Benefits issued on August 28, 2009. R. 185-89. The order concluded, contrary to the decision of the administrative law judge (ALJ), that petitioner was an independent contractor, not an employee, of respondent Adams, but affirmed the ALJ's determination that petitioner is not entitled to benefits because any working relationship between petitioner and Mr. Adams had ended before the time of the accident. Petitioner filed a timely petition for review of the Commission's order on September 25, 2009. Utah Code Ann. § 78A-4-103(2)(a) (West 2009) gives this Court jurisdiction over "the final orders and decrees resulting from formal adjudicative proceedings of state agencies."

ISSUES PRESENTED UPON APPEAL

1. Did the Labor Commission reasonably conclude that petitioner was an independent contractor, not respondent Adams' employee?

Standard of Review: "Because the Legislature has vested the Labor Commission (the Commission) with a great deal of discretion concerning matters involving workers' compensation, we will reverse the Commission's decisions only if they are unreasonable or irrational." *Gates v. Labor Comm'n*, 2002 UT App 428 at *1, 2002 WL 31839167 .[1] *See also Osman Home Improvement v. Indus. Comm'n*, 958 P.2d 240, 243 (Utah App. 1998) ("In applying [an intermediate] standard [of review], we determine whether the agency decision exceeded "'the bounds of reasonableness and rationality.'") (quoting *Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n*, 858 P.2d 1034, 1037 (Utah App. 1993) (citation omitted)). To the extent that petitioner challenges the Commission's underlying factual findings, they "will be affirmed so long as they are supported by substantial evidence, 'in light of the whole record.' So long as the findings are supported by substantial evidence, we will not overturn them 'even if another conclusion from the evidence is permissible.'" *Gates*, 2002 UT App 428 at *1 (quoting *Whitear v. Labor Comm'n*, 973 P.2d 982, 984 (Utah App. 1998) (internal citation omitted; quotations and citation omitted in original)).

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[1]Unpublished decisions of this Court are binding precedential authority. *Grand County v. Rogers*, 2002 UT 25, ¶ 16, 44 P.3d 734; *see also* Utah R. App. P. 30(f).

2. Assuming, only for purposes of argument, that petitioner was an employee of Mr. Adams, did his claimed injury occur in the course of his employment, for purposes of Utah Code Ann. § 34A-2-401(1) (West 2004)?

Standard of Review: The Utah Supreme Court has held that whether an employee is within the course of employment for purposes of the Workers' Compensation Act "is a mixed question of law and fact." *Salt Lake City Corp. v. Labor Comm'n*, 2007 UT 4, ¶ 13, 153 P.3d 179 (analyzing liability under the coming-and-going rule). "Agency decisions that apply the law to facts are entitled to discretion and 'are [only] subject to judicial review to assure that they fall within the limits of reasonableness and rationality.'" *Allen v. Dep't of Workforce Servs., Workforce Appeals Bd.*, 2005 UT App 186, ¶ 6, 112 P.3d 1238 (quoting *Utah Dep't of Admin. Servs. v. Pub. Serv. Comm'n*, 658 P.2d 601, 610 (Utah 1983) (alteration in original)). "In contrast, we will overturn an agency's factual findings only if they are 'not supported by substantial evidence when viewed in light of the whole record before the court.'" *Id.* (quoting Utah Code Ann. § 63-46b-16(4)(g) (1997)).[2]

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All relevant text of constitutional provisions, statutes, and rules pertinent to the issues before the Court is contained in the body of this brief.

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[2]The identical statutory language is now found at Utah Code Ann. § 63G-4-403(4)(g) (West 2009).

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

Petitioner filed his application for hearing in this case on February 6, 2006, seeking workers' compensation benefits for an injury allegedly sustained in an industrial accident occurring on December 26, 2005. R. 1-2. The case was heard by an administrative law judge, who denied benefits. The ALJ ruled that petitioner was an employee of respondent Adams, but concluded that the employment relationship was terminated on December 23, 2005, and that the accident causing the alleged injury took place neither within the time and space boundaries of the employment nor in the course of an activity related to the employment. R. 126-32.

Petitioner moved for review by the Utah Labor Commission. R. 133-46. The Commission adopted the ALJ's findings of fact, but, contrary to the ALJ's determination, concluded that petitioner was an independent contractor, not an employee, and was not entitled to workers' compensation benefits for this reason. The Commission agreed, however, that even if petitioner had established that he was Mr. Adams' employee, he would still not be entitled to benefits because any employment relationship had ended by the time of the accident. R. 185-89; 187 n.2. Petitioner then sought review in this Court.

B. Statement of Relevant Facts[3]

Respondent Adams owns certain rental properties in Midvale, Utah. R. 127. Mark Warburton collects rent on the properties from the tenants for Mr. Adams. He is also the person tenants contact if repairs are needed, and the person who contacts repairmen to perform the repairs. R. 127 n.1. On November 22, 2005, Mr. Warburton offered to pay petitioner $1,500 to "fix up" three vacant, vandalized apartments, an amount that included both labor and supplies. R. 127, 185-86. The project required petitioner to remove garbage; rake leaves; repair drywall, plumbing, and furnaces; and perform sandblasting. R. 127 n.1, 186. Petitioner stated that he could complete the project in three to four days. R. 127. He used his own truck and tools, including his own air compressor. R. 128, 186. Some cleaning supplies and a trailer to haul away trash were made available for his use. R. 128, 186.

On November 27, 2005, Mr. Warburton visited the apartments and became upset by the lack of progress on the project. At that time, petitioner presented him with receipts for work and material that exceeded the agreed $1,500 budget. R. 186. Mr. Warburton then left town for approximately one week. On his return, petitioner gave him a summary of work time and receipts totaling approximately $4,500. R. 128, 186. On December 6, 2005, Mr. Warburton and Mr. Adams surveyed the project, which was still incomplete,

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[3]Respondent Uninsured Employers Fund (UEF) notes that petitioner's statement of facts is replete with references to his own testimony contradicting the facts as found by the ALJ and the Commission. UEF submits that the relevant facts are those found by the Commission, adopting the ALJ's findings–not petitioner's testimony to the contrary.

and met with petitioner. Mr. Adams gave petitioner a check for $4,000 and told petitioner to wrap up the job. Petitioner responded that he would finish in one day. R. 128, 186.

Mr. Warburton developed pneumonia and was unable to visit the site for the next ten days. On December 23, 2006, Mr. Adams visited the property, and petitioner asked for an additional $9,800. Mr. Adams refused, pointed out petitioner's shoddy workmanship, and ordered petitioner off the property. Petitioner threatened Mr. Adams physically, collected his tools, and left. R. 128, 186.

Petitioner returned to the job site on December 26, 2005, with a third party to retrieve his air compressor, and allegedly injured his back helping to lift the compressor into his truck–an injury he first reported to his doctor over one month later. R. 129, 186. In subsequent correspondence with Mr. Warburton, he threatened to file a civil lawsuit and to make a report to the U.S. Immigration and Naturalization Service. R. 124, 128. On January 12, 2006, he filed a mechanic's lien against the property in the amount of $8,907.32. R. 122, 128. On February 13, 2006, he wrote to Mr. Adams, informing him of the injury and again threatening suit. R. 125, 128.

SUMMARY OF ARGUMENT

The ALJ and the Commission, while agreeing on the facts underlying petitioner's claim to employee status, disagreed on the result: the Commission, unlike the ALJ, concluded that petitioner was an independent contractor, not an employee. Petitioner points to the conflict between his and respondents' testimony to support his claim of employee status. However, in determining whether the Commission's decision is

supported by substantial evidence, this Court "will not substitute its judgment as between two reasonably conflicting views, even though we may have come to a different conclusion had the case come before us for de novo review." *Grace Drilling Co. v. Bd. of Review*, 776 P.2d 63, 68 (Utah App. 1989). Moreover, petitioner has not scrupulously marshaled the evidence supporting the facts that underlie the Commission's decision, as he is required to do. *Gates*, 2002 UT App 428 at *1. Because there is substantial evidence of record supporting the Commission's decision, it falls within the bounds of reasonableness and rationality, and there is no basis to disturb it.

Even if the Court were to rule that he was an employee, petitioner has failed to counter the substantial evidence that any working relationship ended days before his claimed injury. While he argues that respondents' testimony on this issue is self-serving, he acknowledges that the parties had a "falling out" on December 23, 2005, the date that marked the end of the relationship under both the ALJ's and the Commission's analysis. He also fails to recognize that his own testimony–and his self-generated written summary showing that he worked for several hours on December 26, 2005, the date of the alleged accident–are equally self-serving. As with the first issue, the substantial evidence standard requires affirmance of the Commission's decision between plausible alternative views of the evidence.

Petitioner's contention that any doubt must be resolved in favor of compensation cannot be sustained in light of the applicable standard of review. Because the

Commission's decision, as supported by substantial evidence of record, falls within the limits of reasonableness and rationality, it warrants this Court's affirmance.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S CONCLUSION THAT PETITIONER WAS AN INDEPENDENT CONTRACTOR, NOT AN EMPLOYEE

"Substantial evidence is 'more than a mere "scintilla" of evidence ... though "something less than the weight of the evidence."'" *Grace Drilling*, 776 P.2d at 68 (quoting *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 715 P.2d 927, 930 (1985) (quoting *Consolo v. FMC*, 383 U.S. 607, 620 (1966)); *see also Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 2007 UT 42, ¶ 35, 164 P.3d 384 (quoting *Grace Drilling*). "An administrative law decision meets the substantial evidence test when 'a reasonable mind might accept as adequate' the evidence supporting the decision." *Martinez*, 2007 UT 42 at ¶ 35 (quoting *Grace Drilling*, 776 P.2d at 68 (internal quotation marks and citation omitted)). So long as the Commission's conclusion that petitioner was an independent contractor is based on evidence a reasonable mind might accept as adequate to support it, petitioner's disagreement with the result is not a basis for reversal. And nothing in petitioner's argument forecloses the reasonable conclusion drawn by the Commission: that he was not an employee of respondent Adams. R. 187.

The Commission began its analysis by referring to Utah Code Ann. § 34A-2-103(7)(a) (West 2004), noting that, under the statute, an employer who retains

supervision and control over the work performed by a contractor is considered the contractor's employer if the "work is a part or process in the trade or business of the employer."[4] It then examined a nonexclusive list of factors relevant to control, as articulated by the Utah Supreme Court in *Bennett v. Industrial Commission of Utah*, 726 P.2d 427, 430 (Utah 1986), including the extent of actual supervision of the worker, the method of payment, the furnishing of equipment, and the right to terminate the worker. Applying these factors, the Commission concluded that petitioner "acted as an independent contractor and was not an employee of Mr. Van Adams." R. 187. It observed specifically that "the work Mr. Norris performed was not 'part or process in the trade or business'" of Mr. Adams' rental enterprise–a conclusion petitioner has not contested. R. 187.

A. Part or Process in the Trade or Business

Although petitioner does not directly address the Commission's conclusion that his work was not a part or process in Mr. Adams' rental business, the issue was addressed in a case he cites. In *Rustler Lodge v. Industrial Commission of Utah*, 562 P.2d 227 (Utah 1977), a drywall applicator was held to be an employee of a lodge where he installed drywall for a storage area and a conference room ceiling. There are significant distinctions between the facts of *Rustler Lodge* and those of the present case. Relevant to the issue of whether the work was a part or process in the trade or business, the *Rustler*

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[4]The same language is contained in the current codification of the statute at Utah Code Ann. § 34A-2-103(7)(a)(ii) (West Supp. 2009).

Lodge court found "that the lodge regularly employed maintenance and handy men and [the drywall applicator] in fact acknowledged that they were engaged in the performance of light construction activity about the lodge at the same time in question." *Rustler Lodge*, 562 P.2d at 229. Given the fact that the lodge "conducts its own maintenance and repairs with a handyman crew hired for that purpose," *id.* at 228, the court had no difficulty concluding "that the services performed by [the drywall applicator] were in the same nature of maintenance and repairs being carried on by other employees of the lodge and hence a part or process of the trade or business of the lodge." *Id.* at 229.

By contrast, petitioner names no other employees of respondent Adams' rental business, let alone employees who were regularly engaged in the business of restoring vandalized rental units. In fact, Mr. Warburton testified that maintenance issues were routinely handled by outside contractors: "[W]e've hired Carpet One for the carpet, we hire the plumber for the plumbing. These guys come and in in [sic] there – they just do the work. We got a leaky toilet. Okay, let me come and fix it. This carpet needs replaced. Carpet One comes and replaces it." R. 191 at 143:8-13. Petitioner has identified no evidence showing that respondent Adams had any employees at all, let alone employees who performed the same work that he did.

B. Method of Payment

Rustler Lodge is distinguishable on another basis. In that case, it was agreed that the drywall applicator "would be paid at the hourly rate of $8." 562 P.2d at 228. Although petitioner claims he was to be paid $40 per hour, neither the ALJ nor the

Commission credited his testimony on this point. R. 127 ("Mr. Warburton informed Petitioner that the budget for fixing up the apartments was $1,500.00 which included Petitioner's wage and services and supplies.") (footnote omitted); 186 n.1 ("The Commission notes Mr. Norris testified that he was offered $40 an hour to complete the project. However, after reviewing the evidentiary record, the Commission finds the other testimony more credible.").[5]

It is telling that petitioner admits in his brief that "the projected budget for the Holden Street repairs was $1500.00." Aplt. Brief at 18.[6] In addition, both Mr. Warburton and respondent Adams testified that the budget for the entire project was $1,500. R. 191 at 108:24 - 109:11, 109:16-21, 135:17-23, 141:1-7, 142:17, 165:1-3, 166:1-2, 183:8-12. Mr. Warburton also explicitly denied–twice–that he ever agreed to pay petitioner by the hour. R. 191 at 119:10-18, 140:7-8. He explained how the agreement to the $1,500 budget came about:

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[5]Petitioner complains that "[t]he Commission however never specifies what that 'other testimony' was, but presumably it was the alleged $1500.00 budget for the needed repairs." Aplt. Brief at 18. Respondent Uninsured Employers' Fund observes that it is petitioner's burden to "*marshall* all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." *Grace Drilling*, 776 P.2d at 68; *see also Martinez*, 2007 UT 42 at ¶ 17, *Gates*, 2002 UT App 428 at *1. The Court has discretion to decline to review the Commission's factual finding based on petitioner's failure to marshal. *Martinez*, 2007 UT 42 at ¶ 19.

[6]This admission is particularly revealing in light of petitioner's hearing testimony that he was unaware of the $1,500 budget until he confronted respondent Adams several weeks after receiving a check for $4,000 on December 6, 2005. R. 191 at 96:24 - 97:11.

A I borrowed a dolly from Mr. Norris back in probably November time frame of last year and he was asking for the dolly. And I used the dolly to move a refrigerator. I went to the apartments and there was four apartments that were vandalized. Rick Norris was calling about his dolly. I said come over here and get it, and when you get over here I'll show you something. These apartments got thrashed. That's how the whole thing started. He came over and picked up his dolly and looked in the four units that were vandalized and that's where the whole–the whole thing started where, you know, "Mark, I can help you fix these if you want. I'm a handyman kind of thing." And that's where I called Van and asked him what the budge[t] was for this. I told Rick Norris in person that the budget was $1,500, to go ahead and see if we could get these apartments fixed. And what that meant was painted, patching the holes, sanding, maybe those kinds of things to get it back to rentable conditions.

Q Did the $1,500 include Rick's salary as well or Rick's payment as well?

A $1,500 was the budget for the total project. Period.

R. 191 at 108:12 - 109:7. He further testified that petitioner agreed to those terms: "I said we have a budget. If you can do it within his budget, do it. If he can't, don't do it. That's basically how it started. 'Oh, I need some Christmas money. I'll do it for that.' That's exactly how it was done." R. 191 at 112:22 - 113:1.

Another indication that respondent Adams did not agree to pay petitioner by the hour is the projected completion time for the project. Although petitioner testified that Mr. Warburton told him to turn in a time sheet every two weeks "[a]t the very beginning when we first started[,]" R. 191 at 79:8, he had previously testified to telling Mr. Warburton that the project could be completed in three or four days:

A You know, there was a conversation when we first got started and that. I remember him saying something to the effect, you know, how long this is going to take and then I says, you know–I can't remember but it was short time. It might have been four days or three days or something along those lines.

R. 191 at 77:5-10. A projected completion date of three to four days is inconsistent with petitioner's subsequent claim that, from the outset, he was to keep track of his hours and turn in time sheets every two weeks–a period four times petitioner's own estimate of the project's duration. It is, however, consistent with an agreement to pay a fixed sum for a fixed result: restoration of the apartments to a rentable state. Petitioner's testimony that he anticipated completing the project within a three-to-four-day period also casts doubt on the credibility and accuracy of plaintiff's self-generated time sheet documents. *See* R. 76-115. In fact, Mr. Warburton testified that he had never seen the alleged time sheets contained in petitioner's Exhibit P-2, and that petitioner did not present the time sheet summary contained in petitioner's Exhibit P-1 until he and Mr. Adams met with him on December 6, 2005. R. 191 at 120:8 - 121:22.[7]

Although petitioner neglected his burden to marshal the evidence supporting the Commission's finding that he was to be paid $1,500 to complete the project of rehabilitating the rental units, there is substantial evidence of record that a reasonable mind might accept as adequate to support it. The Court need not reach petitioner's argument on this point in light of his failure to marshal. But even if the Court chooses to consider it, the substantial record evidence in support of the finding requires that it be sustained.

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[7]Mr. Warburton's testimony clearly distinguishes between the daily time sheets presented as Exhibit P-2 and the time sheet summary presented as Exhibit P-1. However, Mr. Warburton became confused and erroneously referred to Exhibit P-1, the summary he acknowledged having seen, as Exhibit P-2. *See* R. 191 at 121:20-22.

C. Extent of Actual Supervision

As direct evidence of respondent's right to control the work, petitioner asserts that the ALJ found "that Mr. Warburton was frequently on the job site." Aplt. Brief at 15. An examination of both the ALJ's and the Commission's orders belies petitioner's statement. The ALJ noted that after petitioner agreed to fix up the rental units on November 22, 2005, Mr. Warburton visited the rental units on the Sunday after Thanksgiving (November 27, 2005) and then left town on December 1, returning with respondent Adams to meet with petitioner again on December 6, 2005. After that meeting, Mr. Warburton developed pneumonia and did not visit the rental site for ten days. On his recovery, he visited the property once a week. On December 23, Mr. Adams visited the site and ordered petitioner off the property. R. 127-28. Simple calculation shows that Mr. Warburton's visits between the time of petitioner's engagement on November 22 and his termination on December 23 numbered no more than three.[8] The Commission's order sets out a similar time line, showing Mr. Warburton visiting the property on November 27 and December 6, when he became bedridden for ten days, and thereafter visiting once a week until December 23. As the Commission concluded, "This minimal interaction did not amount to any form of supervision over Mr. Norris." R. 187. Petitioner's brief does

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[8]If Mr. Warburton visited on December 6, 2005, and was bedridden for the next ten days, he would have been unable to visit until at least December 16. Given that petitioner was ordered off the property on December 23, 2005, there could have been only one "weekly" visit after Mr. Warburton's bout with pneumonia but before petitioner was terminated from working on the project.

not take issue with the ALJ's or Commission's findings as to the dates of Mr. Warburton's visits, but simply recharacterizes them as frequent. He provides no legal authority supporting that recharacterization. *See* Aplt. Brief at 15-16.

D. Right to Control the Work v. Autonomy

Contrary to petitioner's implication, the ALJ (and the Commission, by adopting the ALJ's findings) did not conclude that petitioner's work was performed exclusively at respondent's and Mr. Warburton's direction; rather, the ALJ stated that "[o]n Mr. Warburton's instruction *or consent*, Petitioner boarded up windows, changed locks, replaced thermostats, repaired drywall, a pothole, a gutter spout and a toilet handle, boarded up windows, tore out carpeting, determined where leaks occurred and purchased cheap cleaning supplies and paint." R. 128 (emphasis added). The fact that Mr. Warburton consented to certain work proposed by petitioner emphasizes that petitioner exercised a substantial degree of autonomy in selecting the activities he deemed appropriate to the job of preparing the units for rental. As Mr. Warburton testified, "Yeah, he had his own truck, had his own tools and, you know, it's like this is the project, finish it. See you later, have a nice day. And then that was it." R. 191 at 142:6-8. He further explained, "Well, I think what we talked about me and Rick were in together and we talked about what needed to be done, and the objective was to get them [the apartments] rentable. Period. Can you do it for this amount, yes or no? Yes, I can. That was it." R. 191 at 146:2-5.

Mr. Warburton also stated that petitioner was "the one that kept adding little things. 'Hey, Mark, this is this, and I found this, I found this, I found that, I found this.'" R. 191 at 146:9-11. He provided an example of petitioner's control over the way the project proceeded:

> Q Did you ask Mr. Norris to repair a furnace in apartment number four?
> A No, that's–what happened there was Rick tore out the hallway in that area and he said I'm just removing the sheet rock and replacing the patch. He took out the whole hallway, including the furnace at the end of the hallway. I remember asking him why did you tear the furnace out? You didn't need to tear the furnace out. "Well, yeah, I don't do–I do things the right way and whatever." I says, you know, now after you patch this and now that you're done with the job I'm going to have to hire a furnace guy to come in and put it in here. "Oh, I can do it, I can do it, I can do it." It was never done and we had to hire a furnace guy to come in there and the furnace back in and charged us $250 to put the furnace back in.

R. 191 at 132:4-18. This testimony demonstrates that petitioner, not respondent, was in charge of the way in which the job was performed.

Petitioner's claim that the ALJ found that "[h]e hired painters and other helpers at Mr. Warburton's request" is equally unsupported. Aplt. Brief at 16. Scrutiny of the ALJ's and the Commission's orders discloses no such finding in either document. Moreover, this statement is in direct contradiction to Mr. Warburton's testimony at the hearing before the ALJ. Mr. Warburton noted that when he was on the property about once a week, "some of the times [petitioner] was there, some of the times he was not. Most of the time there was people there, homeless people that he hired were there." R. 191 at 113:15-17. When asked if he ever asked petitioner to "hire anybody else," Mr. Warburton responded,

"No, I did not." R. 191 at 113:18-19. And when asked if he ever fired one of them, he answered, "I never fired anybody." R. 191 at 114:9. He similarly denied hiring "a couple of guys that were hanging out around the apartments to help Rick? A guy named Marco and a guy named Pedro?" R. 191 at 132:19-21. He responded,

> A I hired nobody. I mean, there was homeless people there. There was guys that Rick said, "Oh these homeless people didn't show up so [I] hired these two guys instead." Those guys came up there and while Rick was working there and asked Rick, "Hey, do you need any help? I'm a handy guy." "Well, yeah, and the homeless people didn't show up today, you guys can take their spots." That's how the whole thing went out, just like that.
> Q How do you know?
> A How do I know? He told me. "My guys didn't show up today, but these guys came by asking me if I wanted some help and I hired them." I says, whatever. And I remember Rick telling me those guys worked all day and I paid them but they didn't do anything. And I remember saying why did you pay them then?

R. 191 at 132:22 - 133:11. When asked if he "t[old] Mr. Norris to go hire homeless people from the shelter and keep them busy[,]" R. 191 at 134:6-7, Mr. Warburton replied, "No. The homeless shelter was his own idea. He painted his own house and he hired homeless people for that too. That's what he does. That was his own thing. Whatever he did with the homeless shelter or wherever he found these people was not from me." R. 191 at 134:8-12.

Nor did Mr. Warburton ask petitioner to hire painters; instead, Mr. Warburton hired them separately, and they did not work under petitioner's supervision. As Mr. Warburton explained,

> [w]ell, we got to the point where I think the project was three weeks into it and there was so far from being done. Rick was saying, I'm way over budget, I'm way over budget, I'm way over budget. I had a friend that had a cousin that does painting. It was around Christmas time, the guy's from, I don't know, he's not from here. He said he would do the painting for us, all four units for I think $1,200. So we told the guys to paint them for us since it was so far into the project we were behind schedule.

R. 191 at 115:3-11. As to supervision, Mr. Warburton testified, "I don't think that anybody supervised." R. 191 at 115:23-24. He explained that "they came three nights, they worked from 5:00 until midnight I think it was unsupervised and they did their own thing and when I got there, they were done in three days." R. 191 at 131:2-4. Unlike the labor that petitioner hired to complete his own responsibilities, the painters were outside the remaining scope of the project he was engaged to complete.

Petitioner's autonomy over his own work is amply demonstrated by the record evidence. He was engaged to accomplish a general goal: to restore certain apartments to rentability. He determined that he could accomplish this goal within a fixed budget in a three-to-four-day time frame, and was left alone to do so until the four days had lapsed. Even after that time, any supervision by respondent was minimal: weekly, at the most. He made suggestions for additional work to which Mr. Warburton consented. He hired his own labor to assist him in completing the project. Only when he failed to complete the project within the agreed budget and in a timely manner did respondent terminate the working relationship and order him off the job site. The record provides substantial evidence for the findings supporting the Commission's conclusion that respondent did not

exert sufficient control over petitioner's activities to overcome his status as an independent contractor.

E. Tools and Supplies

Both the ALJ and the Commission observed that petitioner used his own tools and supplies in his work on the project. The ALJ stated, "Petitioner used his own truck and tools to repair the rental units[,]" R. 128, and the Commission noted that "Mr. Norris began working on the apartments using his own truck and tools, including his air compressor for sandblasting." R. 186. While acknowledging this finding, petitioner further states that "Respondent purchased paint and cleaning supplies for Petitioner to use and also provided a trailer so Petitioner could haul garbage away." Aplt. Brief at 20. The provision of incidental supplies and the use of a trailer are not incompatible with the fact that petitioner "had his own tools and he had a job to be done." R. 191 at 140:2. In fact, Mr. Warburton took pains to make sure that petitioner's tools would be secure:

> Q Okay. You said Mark told you to store your tools in the garage. Was that a condition of the work or was it because he just didn't want your tools to be stolen?
> A Well, I think it was because of the problems, the vandalism and stuff. He was afraid that people would come back and revandalize those apartments again.
> Q But you testified Mark was your friend?
> A Yes.
> Q I assumed he didn't want your tools to get stolen?
> A Right.

R. 191 at 93:9-18. As to supplies, petitioner's own hearing exhibits evidence that he purchased most of the supplies for use on the project. *See* R. 76-80 (listing cost of

"materials and supplies" for the project); 82 (listing "personal items used for job"); 83-115 ("time sheets" that include receipts for purchases). The fact that he furnished the supplies is further evidenced by his subsequent filing of a mechanic's lien, in part, for materials. R. 122.

F. Miscellaneous Factors

The mechanic's lien petitioner filed against the rental property on January 12, 2006, is additional evidence that even petitioner considered himself an independent contractor, not an employee. In the notice of lien, petitioner states under oath that he supplied "LABOR FOR REPAIRS, IMPROVEMENTS AND MATERIALS on [and after] NOVEMBER 22, 2005." R. 122. This claim is inconsistent with employee status. While neither the ALJ nor the Commission based its decision on this fact, it provides additional support for the conclusion that petitioner acted as an independent contractor and is an additional basis on which the Court can affirm the Commission's decision:

> [I]t is well settled that an appellate court may affirm the judgment appealed from "if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, *was not raised in the lower court, and was not considered or passed on by the lower court.* "

Dipoma v. McPhie, 2001 UT 61, ¶ 18, 29 P.3d 1225.

Petitioner's reference to an alleged determination by the United States Internal Revenue Service that he was an employee, not an independent contractor, carries little weight. The record contains no testimony or other evidence showing how the IRS

determination was reached, and there is no indication that the process involved information provided by both petitioner and Mr. Adams. Nor is there any discussion of the factors that the IRS deemed relevant to its decision or how those factors might relate to the factors relevant under Utah law. Moreover, the alleged "determination" does not appear in the record. Finally, although petitioner claims that the IRS required respondent to issue a W-2 tax form instead of a Form 1099, there is no W-2 of record, and the Form 1099 was marked but not admitted as a hearing exhibit. Under these circumstances, petitioner's scant reference to the IRS determination is equivocal at best.

In light of these miscellaneous factors, as well as petitioner's use of his own tools and supplies, his right to control the manner in which the work was performed, the absence of substantial oversight by respondent, the lump sum budget for the project, and the fact that the work was not a part or process in respondent Adams' trade or business, the Commission's substantially supported findings sustain its conclusion that petitioner was an independent contractor. For these reasons, its decision that petitioner is not entitled to workers' compensation benefits for his injuries is within the limits of reasonableness and rationality, warranting this Court's affirmance.

II. ANY WORKING RELATIONSHIP BETWEEN PETITIONER AND RESPONDENT ADAMS WAS SEVERED BEFORE PETITIONER SUSTAINED HIS INJURY

Even if petitioner were found to be respondent Adams' employee, any working relationship had ended, as both the ALJ and the Commission concluded, before petitioner sustained his alleged injury. R. 131, 187 n.2. While conceding that he and respondent

Adams "had a falling out" on December 23, 2005, petitioner asserts that he continued to work on the day of his injury, December 26, the same date on which he returned to the work site to pick up his air compressor. Aplt. Brief at 22. He argues that the action of retrieving his air compressor constituted a retrieval of his personal effects that should extend the employer's liability for workers' compensation benefits past the exact time of termination, although he admits that there is no Utah case law on point. He urges the Court to implement a policy extending compensation to post-termination activities necessary to the orderly termination of the employment relationship. However, petitioner cannot prevail for three reasons. First, the Commission's decision falls within the limits of reasonableness and rationality, and the underlying findings of fact are supported by substantial evidence. Second, petitioner did not raise this issue until his petition for review of the ALJ's decision by the Commission. His "failure to raise the claim at the original hearing precludes any review on appeal." *Zupon v. Indus. Comm'n of Utah*, 860 P.2d 960, 963 n.2 (Utah App. 1993). Third, each of the cases petitioner cites in support of this proposition is readily distinguishable.

In *Nicholson v. Industrial Commission*, 76 Ariz. 105, 259 P.2d 547 (1953), an employee was killed when the roof of a loading platform collapsed and the material it supported fell on the employee and crushed him while he was eating his lunch in the shade it provided. The platform had undergone a temporary repair about 50 minutes before the lunch period, "at which time the employees were told not to return in the afternoon for work but to return the following morning, giving time to repair the

platform." 259 P.2d at 548. Even though the work for the day "had unexpectedly come to an end at the noon hour," *id.*, the court concluded that the death was compensable. Noting that "[t]his employee was not permanently fired or discharged[,]" the court stated, "Unquestionably in the instant case compensation would have been payable had it been contemplated that the employee would resume his employment after the lunch period. What difference should it make that there was to be a cessation of work until the following morning?" *Id.* at 550. Unlike the employee's job in *Nicholson*, petitioner's working relationship with respondent Adams had been severed days before he was injured.

St. Anthony Hospital v. James, 889 P.2d 1279 (Okla. App. 1994), is similar to *Nicholson* in this relevant aspect. The employee worked at the hospital as a licensed practical nurse and had not been separated from employment at the time she was injured. As the court explained, "[t]he injury occurred on her day off work. She had returned to the workplace to pick up her paycheck and accomplish other errands." 889 P.2d at 1279. The court found the injury compensable. Noting that "[a]fter surveying the resolution of this issue, it becomes clear the authority in the area is diverse, if not splintered[,]" *id.* at 1281, the court limited its decision affording coverage for the injury to the facts of the case. The court further observed that the rule articulated in Larson's Workmen's Compensation Law, placing an employee "in the course of employment while collecting his pay, arose in instances where the employee has been terminated; the rule is preceded by the statement that the contract of employment is not fully terminated until the

employee is paid." *Id.* Given that respondent Adams had paid petitioner all the money he believed petitioner was due on December 6, 2005, the rationale underlying the rule cited in *St. Anthony Hospital* is not applicable here.

Although petitioner contends that his case is remarkably similar to *Herman v. Sherwood Industries, Inc.*, 244 Conn. 502, 710 A.2d 1338 (1998), the facts show the contrary. The claimant in that case was terminated from employment and, on the same day,

> attended a termination meeting at Sherwood's personnel office. At that meeting, Sherwood's personnel officer conducted an exit interview and gave the claimant a layoff slip and a copy of an exit interview check list. Also at the termination meeting, the personnel officer informed the claimant that he could retrieve his personal tool box from the Sherwood loading dock, where it had been placed by Sherwood's foreman. Thereafter, in order to retrieve his tool box, the claimant was escorted from the personnel office to the loading dock,

where he was injured. 710 A.2d at 1339. Although the court ruled that "a claimant is entitled to workers' compensation for an injury that was incurred while leaving the job site immediately after the termination of his or her employment[,]" *id.* at 1341, it stated that "[t]he facts of this case do not require us to consider the more difficult question of whether an injury is compensable if it is incurred when a discharged employee *returns* to the job site." *Id.* at 1341 n.8.

Nails v. Market Tire Co., 29 Md. App. 154, 347 A.2d 564 (Md. Ct. Spec. App. 1975), is likewise distinguishable. In *Nails*, a mechanic who was terminated from employment was injured when he "returned to the job two days after being discharged to

pick up his tools, which he was required to furnish as a condition of his employment." 347 A.2d at 567. The court permitted compensability on the ground that "it was customary to allow employees two or three days to remove their tools." *Id.* However, the court noted that "[t]here is responsible authority to the contrary[,]" acknowledging that "whether an accident causing an injury to an employee results from some obligation, condition or incident of the employment depends on the circumstances of each particular case." *Id.* Petitioner has pointed to no custom or practice by respondent Adams of permitting a delayed retrieval of tools from the job site when a project is completed.

Finally, petitioner asserts that there was evidence showing that he was still employed and rendering services to respondent Adams on December 26, 2006, the date of the injury, and contends that there is no independent documentary evidence to the contrary. While accusing respondent of "inherently self serving" and "suspect" testimony that the working relationship was severed on December 23, 2005, Aplt. Brief at 22, petitioner fails to recognize that the evidence he cites to show services rendered on December 26, his own testimony and the work summaries he generated, are equally self-serving and suspect. It was the Commission's role to choose between equally plausible–or implausible–views of the evidence, a choice that this Court will not overturn "even though we may have come to a different conclusion had the case come before us for de novo review." *Grace Drilling*, 776 P.2d at 68.

The record, as a whole, contains substantial evidence supporting the findings underlying the Commission's conclusion that any working relationship between petitioner

and respondent Adams had ended before the date of petitioner's alleged injury, December 26, 2005. The Commission's choice to believe respondent Adams' testimony over petitioner's was a legitimate view of the evidence. Given the record support for the Commission's ruling on this point, there are no grounds for reversal of its determination that petitioner would not have been entitled to workers' compensation benefits even if he had been respondent Adams' employee.

III. LIBERAL CONSTRUCTION OF THE WORKERS' COMPENSATION ACT DOES NOT ENTITLE PETITIONER TO BENEFITS WHERE THE RECORD SUPPORTS THE COMMISSION'S CONCLUSION

Petitioner briefly argues that he is entitled to compensation because "disability claims are to be liberally construed in favor of awarding benefits, and any doubts raised from the evidence are to be resolved in favor of the claim." Aplt. Brief at 25. In support, he provides, without analysis, a string of citations to cases decided from 1919 to 1990. He ignores this Court's decision in *Strate v. Labor Commission*, 2006 UT App 179, 136 P.3d 1273, rejecting the application of liberal construction where the record supports the Commission's conclusion. *Id.* at ¶ 26. To accept petitioner's argument would be to deprive the Commission of its broad grant of discretion in matters involving workers' compensation, subject only to scrutiny for reasonableness and rationality. *Gates*, 2002 UT App 428 at *1. Liberal construction cannot save petitioner's case in light of the substantial evidence for the findings that support the Commission's decision.

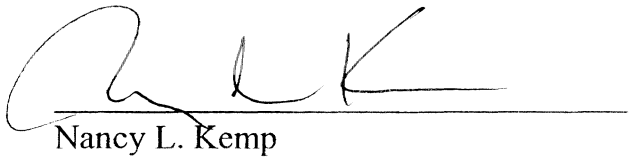
CONCLUSION

The Commission drew two conclusions from its findings of fact: that petitioner was an independent contractor, not respondent Adams' employee, and that any working relationship between the two had terminated before the date of petitioner's injury. Petitioner's failure to marshal the substantial evidence supporting the underlying findings is, by itself, a sufficient basis to affirm the Commission's conclusions. But even if the Court chooses to reach the merits of petitioner's claims, the evidence of record shows that the Commission's decision falls within the limits of reasonableness and rationality. For this reason, it warrants the Court's affirmance.

STATEMENT REGARDING ORAL ARGUMENT

Respondent Uninsured Employers Fund believes the law governing the issues in this case is well settled and that oral argument is not necessary to a proper decision. However, it desires to participate if oral argument is ordered by the Court.

DATED this 2nd day of March, 2010.



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CERTIFICATE OF DELIVERY

I hereby certify that on this 3d day of March, 2010, I caused to be delivered two true and correct copies of the foregoing BRIEF OF APPELLEE UNINSURED EMPLOYERS FUND to the following:

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